UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 53

Docket No. AT-3330-10-0475-I-1

Bobbi R. Williams,

Appellant,

v.

United States Postal Service,

Agency.

May 19, 2011

Flex L. Bell, Jackson, Mississippi, for the appellant.

Dana E. Morris, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant filed a petition for review of the initial decision dismissing her appeal for failure to prosecute pursuant to 5 C.F.R. § 1201.43(b). For the reasons set forth below, we AFFIRM the initial decision AS MODIFIED herein.

BACKGROUND

¶2 The appellant appealed her non-selection for a promotion, alleging that the agency violated her veterans' preference rights under the Veterans Employment Opportunities Act of 1998 (VEOA). *See* Initial Appeal File (IAF), Tab 1. She filed her appeal form via e-Appeal Online, registered as an e-filer, and designated

a representative.[1] *Id.* at 2, 10. On March 9, 2010, the administrative judge issued two orders, one a jurisdictional order requiring the appellant to respond within 15 days of the date of the order and the other a timeliness order requiring her to respond within 10 calendar days of the date of the order.[2] IAF, Tab 2 at 2, Tab 3 at 1-4. The appellant did not respond to either order. The agency thereafter filed a motion requesting the administrative judge to issue a show cause order or a second timeliness order. IAF, Tab 5 at 4-6. The appellant subsequently filed an alleged constructive suspension appeal.[3] *See Williams v. U.S. Postal Service*, MSPB Docket No. AT-0752-10-0579-I-1, IAF, Tab 1.

¶3 On May 7, 2010, the administrative judge ordered the appellant to show cause why he should not impose sanctions pursuant to 5 C.F.R. § 1201.43 for her failure to comply with the Board's March 9, 2010 orders and warned that, if she failed to respond to the show cause order by May 13, 2010, he might dismiss the VEOA appeal for failure to prosecute. IAF, Tab 6. Later that day, the appellant withdrew her status as a registered e-filer. IAF, Tab 7. On May 10, 2010, she informed the administrative judge that she had obtained a representative, but she

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[1] Although the appellant designated "HR Shared Services Department" as her representative, she listed her own physical address and e-mail address as the address for her representative. IAF, Tab 1 at 1, 10. Consequently, the appellant received each filing twice, one addressed to her and one to her purported representative, at her physical address. It is unclear whether she actually had representation during this time, however.

[2] Because of our holding in this appeal, any error by the administrative judge in the content of the notices did not affect the appellant's substantive rights. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

[3] A different administrative judge in the Atlanta Regional Office than the one in the instant appeal was assigned to adjudicate the alleged constructive suspension appeal. *See* MSPB Docket No. AT-0752-10-0579-I-1, IAF, Tab 19 at 1; Initial Decision at 1.

did not address the show cause order.[4] Petition for Review (PFR) File, Tab 3 at 18.

¶4 On May 17, 2010, the administrative judge issued an initial decision dismissing the appeal filed under the VEOA for failure to prosecute under 5 C.F.R. § 1201.43(b). Initial Decision (ID) at 1, 3. He found that imposition of the sanction was necessary to serve the ends of justice based upon the appellant's failure to respond to the three Board orders. ID at 2-3.

¶5 On May 20, 2010, the appellant submitted evidentiary submissions in her alleged constructive suspension appeal. MSPB Docket No. AT-0752-10-0579-I-2, IAF, Tabs 8-10. On the same day, she filed a request to reopen her VEOA appeal with the Atlanta Regional Office, alleging that "due to my inexperience seeking representation I was unable did [sic] to meet the deadlines as stated by the court. I now have reprsentation [sic] and request to proceed with [sic] case as initially intended." PFR File, Tab 1 at 2; IAF, Tab 9. The Atlanta Regional Office forwarded the alleged request to reopen to the Office of the Clerk of the Board for docketing as a petition for review. PFR File, Tab 1 at 1. The agency responded in opposition to the petition for review. PFR File, Tab 4.

ANALYSIS

¶6 We DENY the appellant's petition for review for failure to meet the review criteria under 5 C.F.R. § 1201.115(d).[5] However, we issue this Opinion and

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[4] For reasons that not clear from the record, the May 10, 2010 facsimile was not included in the appeal file. Any error by the administrative judge in not considering the May 10, 2010 submission is cured by our consideration of the filing.

[5] For the first time on review, the appellant submits various documents to support that she is a disabled veteran. PFR File, Tab 3 at 2-12. Because she has not shown that these documents were unavailable prior to the close of the record below, despite her due diligence, the Board need not consider them on review. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); 5 C.F.R. § 1201.115(d)(1). In any event, this evidence is immaterial to the appellant's failure to prosecute her appeal and does not warrant a different outcome than that of the initial decision. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980).

Order to clarify the existing law regarding the imposition of the sanction of dismissal for failure to prosecute under 5 C.F.R. § 1201.43(b).

¶7 The sanction of dismissal with prejudice may be imposed if a party fails to prosecute or defend an appeal. *Ahlberg v. Department of Health & Human Services*, 804 F.2d 1238, 1242 (Fed. Cir. 1986); 5 C.F.R. § 1201.43(b). Although the regulation at 5 C.F.R. § 1201.43(b) does not set forth guidelines for applying this sanction, the Board has held that

> The imposition of such a severe sanction . . . must be used only when necessary to serve the ends of justice . . . as when a party has failed to exercise basic due diligence in complying with an order, or has exhibited negligence or bad faith in his efforts to comply . . . . The severe sanction of dismissal with prejudice for failure to prosecute an appeal should not be imposed when a pro se appellant[6] has made incomplete responses to the Board's orders but has not exhibited bad faith or evidenced any intent to abandon his appeal, and appears to be confused by Board procedures. . . . Further, failure to obey a single order does not ordinarily justify dismissal for failure to prosecute.

Chandler v. Department of the Navy, 87 M.S.P.R. 369, ¶ 6 (2000); *see Wright v. Department of the Treasury*, 53 M.S.P.R. 244, 249 (1992). Sanctions should only be imposed when: (1) a party has failed to exercise basic due diligence in complying with Board orders; or (2) a party has exhibited negligence or bad faith in its efforts to comply. *Chandler*, 87 M.S.P.R. 369, ¶ 6; *Wright*, 53 M.S.P.R. at 249. Nevertheless, absent a showing of abuse of discretion, the Board will not reverse an administrative judge's determination regarding sanctions. *Holland v. Department of Labor*, 108 M.S.P.R. 599, ¶ 9 (2008).

¶8 We note that in recent Board cases citing *Chandler*, the Board has omitted the language authorizing the imposition of the sanction of dismissal for failure to exercise basic due diligence and has stated that the sanction of dismissal may be

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[6] As noted previously, it is unclear whether the appellant was actually represented prior to May 10, 2010. *See* PFR File, Tab 3 at 18; IAF, Tab 1 at 10.

imposed only when the appellant has exhibited bad faith or evidenced any intent to abandon the appeal. *See Holland*, 108 M.S.P.R. 599, ¶ 9; *Gordon v. Department of the Air Force*, 104 M.S.P.R. 358, ¶ 4 (2006); *Robinson v. Department of Veterans Affairs*, 94 M.S.P.R. 509, ¶ 10 (2003). The shift in language occurred because the Board tailored the standard to the particular circumstances of the cases. For example, in *Gordon*, the appellant's non-responsiveness arose from the Regional Office's failure to serve several orders on his representative in the manner elected, not from his bad faith or intent to abandon the appeal. *See Gordon*, 104 M.S.P.R. 358, ¶¶ 4-5. Consequently, the Board omitted the due diligence language and emphasized the second prong of the standard. We make clear that the Board has neither overruled, nor abandoned, the two-prong standard set forth in *Chandler* and *Wright* and reaffirm that the sanction of dismissal may be imposed when: (1) a party has failed to exercise basic due diligence in complying with Board orders; or (2) a party has exhibited negligence or bad faith in its efforts to comply.

¶9 Where an appellant's repeated failure to respond to multiple Board orders reflects a failure to exercise basic due diligence, the imposition of the sanction of dismissal for failure to prosecute has been found appropriate. *See Ahlberg*, 804 F.2d at 1242-45; *Heckman v. Department of the Interior*, 106 M.S.P.R. 210, ¶ 16 (2007); *Murdock v. Government Printing Office*, 38 M.S.P.R. 297 (1988). For example, in *Murdock*, the sanction of dismissal was appropriate because the appellant completely failed to respond to or comply with any of the Board's orders. *Murdock*, 38 M.S.P.R. at 298-99. We analogize the facts in this appeal to those in cases like *Murdock* where the appellant failed to exercise basic due diligence.

¶10 Here, the undisputed record shows that the Atlanta Regional Office sent three orders to the appellant's e-mail account prior to her filing a Termination of

E-Filer Status.[7] *See* PFR File, Tabs 1, 3; IAF, Tab 1 at 2, Tab 2 at 18-20, Tab 3 at 6-7, Tab 6 at 2-3, Tab 7. The appellant made no attempt to respond to or comply with any of the Board's orders, despite explicit warning that noncompliance with the show cause order may result in a dismissal for failure to prosecute. *See* IAF, Tab 6. After the administrative judge issued the May 7, 2010 show cause order, the appellant merely filed a withdrawal of her e-filer status and a form designating a representative. *See* PFR File, Tab 3 at 18; IAF, Tab 7. Neither the appellant, nor her representative, filed a response to the show cause order prior to the May 13, 2010 filing deadline or requested an extension of time to file a response. The appellant's lack of effort to comply with the Board's orders is made clearer by the fact that she capably filed evidentiary submissions in response to the Board's acknowledgment order in her alleged constructive suspension appeal, which she filed while the instant appeal was pending. *See* MSPB Docket No. AT-0752-10-0579-I-1, IAF, Tabs 8-10.

¶11 On review, the appellant merely asserts that she was unable to meet any of the deadlines for responding to the orders because of her inexperience seeking representation and wishes to proceed with her case "as initially intended" now that she has representation. *See* PFR File, Tab 1 at 2. However, the Board has held that an appellant's difficulty in obtaining a representative does not excuse her failure to prosecute her appeal by not complying with the Board's orders. *Murdock*, 38 M.S.P.R. at 299. A pro se appellant may not escape the consequences of inadequate representation. *Id.* Even if the appellant's difficulty in obtaining a representative presented a recognizable excuse, the record does not reflect that she sought extensions of time to respond to the three Board orders or otherwise apprised the administrative judge that she was unable to proceed with her appeal until she obtained a representative.

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[7] Under 5 C.F.R. § 1201.14(m)(2), "MSPB documents served electronically on registered e-filers are deemed received on the date of electronic submission."

¶12 Based on the foregoing, we find no abuse of discretion in the administrative judge's decision to impose sanctions under 5 C.F.R. § 1201.43(b) based upon the appellant's failure to exercise basic due diligence. Accordingly, we AFFIRM the initial decision dismissing this appeal for failure to prosecute AS MODIFIED by this Opinion and Order.

ORDER

¶13 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read

this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.